UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

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WAUSAU UNDERWRITERS INSURANCE, et al.,

Plaintiffs,

-versus- 05-CV-210

(MOTION)

CINCINNATI INSURANCE COMPANY,

Defendant.

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TRANSCRIPT OF PROCEEDINGS held in and for the United States District Court, Northern District of New York, at the James T. Foley United States Courthouse, 445 Broadway, Albany, New York 12207, on MONDAY, FEBRUARY 13, 2006, before the HON. THOMAS J. McAVOY, Senior United States District Court Judge.

APPEARANCES:

FOR THE PLAINTIFFS:

JAFFE & ASHER (by telephone)

BY: MARSHALL POTASHNER, ESQ.

FOR THE DEFENDANT:

HISCOCK & BARCLAY

BY: JOHN CASEY, ESQ.

(Court commenced at 11:07 AM.)

MR. POTASHNER: Good morning, your Honor.

THE COURT: Why don't you go ahead and call it.

THE CLERK: Wausau Underwriters Insurance, et al., versus Cincinnati Insurance Company, 2005-CV-210.

May I have the appearance for the plaintiff, please?

MR. POTASHNER: Yes. This is Marshall Potashner, of Jafee & Asher, for the plaintiffs.

MR. CASEY: John Casey of Hiscock & Barclay.

THE COURT: All right. These are cross-motions for summary judgment. Who went first?

MR. POTASHNER: I did, your Honor.

THE COURT: Okay, Mr. Potashner, why don't you tell us why the Court should grant summary judgment?

MR. POTASHNER: Your Honor, the whole issue before the Court is whether Town Square is an additional insured under an insurance policy issued by Masciarelli Construction. It is undisputed or otherwise hasn't been argued in the motion papers. It is undisputed and has not been argued in the papers that if Town Square is an additional insured, under the policy, that Cincinnati's coverage is primary and Wausau's coverage is excess. The duty to defend arises where the allegations in the

underlying complaint suggest a reasonable possibility that the covered claim has been alleged. Contrary to Cincinnati's arguments, the burden of proof and the burden here is not here because Town Square is an additional insured and not a named insured. As the case law makes clear, the burden is the same.

In addition, contrary to Cincinnati's argument, we need not show the actual cause of the accident to show a duty to defend. Duty to defend is based on the allegations in the complaint and may also arise from other documents in the underlying action. If there is an ambiguity as to whether or not a duty to defend exists, then a duty to defend does exist.

As the Second Circuit held in the Hugo Boss Fashions versus Federal Insurance Company (phonetic) case, there are three types of ambiguities that may give rise to a duty to defend. The first is factual, what is alleged in the underlying action. If the allegations are equivocal, as to the facts alleged, and one possibility is that a covered claim is alleged, then a duty to defend exists.

The second ambiguity is legal. If the cases are equivocal as to whether or not the insurance policy provides coverage, then a duty to defend exists.

The third is contractual. If the insurance policy is ambiguous as to whether it applies, one

construction is that it does apply, then a duty to defend exists.

Here, Therone Williams commenced the underlying action against Town Square, Masciarelli Construction and Visions Federal Credit Union. He alleged that he sustained injuries on February 27, 2003, as a result of slipping and falling on ice in a parking lot owned by Town Square. It is undisputed that Cincinnati's policy provides that Town Square is an additional insured under the Cincinnati's policy, quote, with respect to liability arising out of Masciarelli's ongoing operations performed for Town Square by Masciarelli. As such, if there is any ambiguity in the allegations in the underlying action, the meaning of the term "ongoing operations" or in the way a New York court would apply it, then a duty to defend exists.

Here, the complaint and bill of particulars in the underlying action makes it absolutely clear that the claim arises from a slip and fall on ice on a parking lot that Masciarelli Construction was contractually responsible for plowing and salting. For example, I will not go into each allegation as they are set forth in our motion papers, but in the bill of particulars, paragraph two, in the underlying action, Williams specifically alleges that the location of the accident is, quote, first row parking, far left space along the side of the median. On the same bill

of particulars, he alleges that the cause of the accident was, quote, black ice on the parking lot. And further -- he further alleges that, quote, Williams slipped and fell due to a layer of ice formed on a parking lot, end of quote.

Cincinnati's attempt to argue that Williams might have slipped on the sidewalk is not only factually unsupportable, it is legally irrelevant. In fact, your Honor, one of the pictures attached to Cincinnati's papers establishes that, contrary to Cincinnati's argument, that Williams' accident did not occur on the sidewalk. If your Honor will turn to Exhibit F of the Mitchell affidavit submitted by Cincinnati, it's the last page after the deposition, you will see two pictures.

THE COURT: Go ahead.

MR. POTASHNER: Okay. In his deposition, Mitchell -- I am sorry, in his deposition, Williams stated that he was in the parking lot reaching for the front door to open it when he fell. Given that the sidewalk is in front of the car, Williams must have been at least eight to ten feet away from the sidewalk when he fell. He did not fall on the sidewalk or even just coming off of it.

Cincinnati's further argument that the accident did not arise out of Masciarelli's ongoing operations for Town Square is unsustainable. Masciarelli's conduct and responsibility under the contract were not over

and there is more than a reasonable possibility that the claim in the underlying action arose because either Masciarelli did not salt or plow or did not salt or plow properly or failed to salt or plow as it should have.

Cincinnati's argument is that the term ongoing operations is limited to claims arising from accidents occurring while Masciarelli is at the job site, the parking lot, ignores New York precedents and the language of its own policy. Your Honor, phrase is "ongoing operations," plural, and not ongoing operation. This implied a series of multiple applications -- sorry, a series of multiple operations during the course of which Town Square would be covered.

In a case directly on point, Perez versus New York City Housing, the New York Appellate Division held that this term does not require -- the term "ongoing operations" does not require the named insured to be on site at the time of the accident, as long as a claim arises from the named insured's operations.

Your Honor, this Appellate Division case is binding -- this case is binding on this Court unless Cincinnati was able to offer, quote, persuasive evidence that the New York Court of Appeals would hold differently. Cincinnati has not attempted to offer any evidence that the New York Court of Appeals did not follow the holding in the

Perez case.

Furthermore, the phrase at the end of the endorsement, Cincinnati's endorsement, that a person or organization's status as an insured under this endorsement ends when your operations for that endorsement are completed construes the enforcement is broader than Masciarelli actually working on site. If the phrase ongoing operations was as limited as Cincinnati argues, this last sentence would be superfluous. The policy should not be construed to render this policy meaningless.

Finally, Cincinnati, in its motion papers, raises the sole negligence exclusion, exclusion not previously raised in its disclaimer of coverage. This is an exclusion that Cincinnati bore the burden of proof on this exclusion. Cincinnati points to and submits not one iota of evidence that the exclusion applies.

With respect to the duty to indemnify, the plaintiffs are entitled to indemnification or settlement because there was a potential for liability for covered loss based upon the actual facts known at the time of the accident. This is shown by the pleadings, the bill of particulars and Williams' own deposition testimony in the underlying action.

Because Cincinnati breached a duty to defend, once that simple showing was made by plaintiffs, the burden

shifted to Cincinnati to show that some or all of the settlement was paid on the claim or the settlement sum was unreasonable. Again, Cincinnati simply submits no evidence to support its burden. Because Cincinnati failed to make the necessary showing, it must be bound by the natural inference of the settlement that Williams was entitled to recovery from Town Square based upon the allegations in the verified complaint and the underlying action.

Finally, Cincinnati raises an argument concerning the reasonableness of the settlement. Again, Cincinnati has not submitted an iota of evidence that the settlement was unreasonable. It failed to satisfy its burden of proof to establish a triable issue of fact and it is not entitled to a trial, your Honor, simply by arguing reasonableness, which is all it has done. It has argued, but not submitted any evidence.

Accordingly, your Honor, for these reasons and those reasons in my papers, we respectfully submit that this Court should grant summary judgment in favor of the plaintiffs, should hold that Cincinnati had a duty to defend and indemnify Town Square for the underlying action and hold that the case has been settled, hold that Cincinnati is responsible for reimbursing Wausau the $99,000 settlement sum, plus the defense costs, for the total amount of $108,196.70.

Thank you, your Honor.

THE COURT: Thank you, Mr. Potashner. Okay, Mr. Casey.

MR. CASEY: May it please the Court: This is really a dispute between two insurance companies to determine which carrier afforded coverage for this loss to Town Square, if any, and whether or not Wausau should be reimbursed for the settlement that they voluntarily entered into with the underlying plaintiffs and defense costs.

I think the issues are, number one, is there coverage under the Cincinnati policy? The burden is on the alleged insured or additional insured -- here, Town Square -- to prove that there is coverage in the first instance.

The next issue is this question of ongoing operations relating to Masciarelli, the plowing contractor, and the issue of sole negligence. The policy does not cover liability arising out of the sole negligence of Town Square.

Finally, we have the issue of co-insurance, which carrier is primary or excess or are they equal. Town Square alleges that it's an additional insured under the automatic additional insured endorsement of the policy which was issued by Cincinnati to Masciarelli. Town Square is not a named insured or a named additional insured. There is a provision in the policy that if there is a contract out

there that requires you, Masciarelli, to name someone as an additional insured, they're covered, but only with respect to your ongoing operations.

Now the question is what does "ongoing operations" mean? And I think we have to look at the contracts that are before the Court, the maintenance agreements, and there's three I will discuss. There is the plowing and -- plowing maintenance agreement, the sand/salting maintenance agreement and then there is a separate maintenance agreement that we've presented to the Court involving another contractor who was also responsible for plowing and salting at this mall.

The initial contract with Masciarelli and Town Square, dated November of 2002, provides for plowing, and it specifically sets forth the scope of the work on page 3. "The contractor will perform snow plowing of all parking lots, roads, service roads, loading areas within the Town Square mall, including the out parcels, which are indicated on the attached site plan." Now, the site plan, as far as the contract documents that I've seen, is not attached, so we really don't know exactly what the site plan includes or doesn't include, but at least there is a description here.

If you turn to page 5, here is where we get to what the ongoing operations involve. "Need for snow

plowing. Snow plowing will be required when we receive two inches of snow or greater. The contractor will be on call 24 hours a day, 7 days a week and will be reasonably available when the owner requires plowing to be done. The contractor will be authorized to plow if a general snow is occurring and we have accumulated two inches of snow and more is forecast."

This doesn't make Masciarelli an insurer of that parking lot. He is not on the premises. If there's two inches of snow or greater, he has to plow and he has to be on call. There is no proof before the Court that would indicate that he didn't perform these requirements. There is a letter from Cincinnati Insurance Company which indicates that the last time he was there was two days before, on the 25th -- this accident took place on the 27th of January -- that there was no intervening weather trigger that would call for him to be there. There was no -- at least as far as plowing.

Let's turn to the salting contract, and that's attached to plaintiffs' moving papers, Exhibit 5. Again, it's described as a maintenance agreement and it describes "scope of work, salting," this is on page 3. "The contractor will salt all parking lots, roads, service roads and asphalt loading areas. The contractor at all times will use his best efforts to cover all areas with salt so people

do not get stuck or slip on ice."

Turning to page 5, "Need for salting. Salting operations will be required if we receive less than two inches of snow. Salting operations will be required if we receive freezing rain and/or sleet or standing water freezing. The contractor will be on call 24 hours a day, 7 days a week, and will be reasonably available when the owner requires salting to be done." Again, another description of what the ongoing operations are.

This is not a situation where the contractor has agreed to be responsible for any type of accident that might occur, any type of condition. In this situation, the only proof we have is he was there two days before, took care of whatever was necessary, was not called back, was not requested to do anything, that there was no indication of any weather trigger, snow, two inches or more, or less than two inches, freezing rain or any request to do anything.

I submit that the question of what ongoing operations are is probably a question of fact here as to what happened. We need a trial of that issue to determine whether there were ongoing operations that would trigger the coverage for the additional insured.

As far as the sole negligence question, I think that's tied into this. Could the owner here, the mall, be found solely negligent because they didn't notify

this contractor that we need plowing, we need salting, we need sanding? The testimony from Mr. Williams was he did park in the area of the parking lot described by counsel, got out of his car, had no trouble walking into the Visions' store. When he returned, there was some snow that he described it as bulging, but it was kind of coming off of an island, okay, out onto the lot. We don't know how that got there. Did it get there from plowing? Did it blow? Was there some type of wind event that occurred and caused it? There is just no indication of how that occurred.

So, I think the question of the sole negligence issue is another question of fact that really can't be resolved on these papers. And despite the fact there was an underlying case and there was some depositions, it doesn't appear that either of these issues were addressed.

As far as, you know, who's responsible, again, we've attached a copy of another contract between the plaintiff Town Square and an outfit called Greenskeeper. And it's the same identical type contract as Town Square had with us, or with Masciarelli; it provides for salting and plowing. On page 3, it talks about scope of work, salting, parking, asphalt areas, and it indicates that "Northeast United Corporation will salt all parking lots, roads, service roads and asphalt loading areas." I'm not sure who

Northeast United Corporation is, but it's another entity that apparently, at least as of November of 2002, was doing salting operations.

It also describes the scope of the work for sidewalks for Greenskeeper and basically describes that they're gonna plow, they're gonna salt. Again, the only reason I mention it, I think it raises an issue if another contractor is there moving snow off the sidewalks, which is where this parking space was, next to the sidewalk. If somebody is moving snow off there, did they put the snow on the median or in the area where Mr. Williams fell? They have the same responsibilities under their contract as Masciarelli. And again --

THE COURT: I'm a little confused about that argument because as I understood what he slipped on was black ice. Black ice is something that is difficult to see when it's on asphalt. I understand the composition of the parking area was asphalt. If snow had been plowed over the black ice, perhaps it would have been safer than it was at the time he fell.

MR. CASEY: I think there may have been an issue, reading his deposition testimony, the bill of particulars and the complaint talked about black ice, when he got to -- when Mr. Williams testified, well, maybe it was brown, it was dirty, you know, so it was a typical slip and

fall case. But just referring to this contract for a minute, under "out parcels," on page 5, this is the Greenskeeper contract, it says "the owner and contractor mutually understand and agree that the areas labeled, quote, Pizzeria Uno, Taco Bell, Barnes and Noble's bookstore and Visions Federal Credit Union" -- this is where he was going -- "on the attached site plan are part of this contract," part of the Greenskeeper contract. "No additional funds will be allocated for the plowing and salting of these areas." Again, there is a question of whether this contractor may have done some plowing or salting in that Visions area.

THE COURT: The contractor was never pled in on the original action, was he?

MR. CASEY: No. But we didn't have any control over who the plaintiff sued. The plaintiff sued Masciarelli. Masciarelli, apparently, had very little to do with this action. There was no settlement, nothing paid by Masciarelli, all paid by Town Square through their insurance carrier. From all we can tell, the plaintiff didn't seriously pursue liability against Masciarelli. The case was just settled. They had EBTs of the plaintiff, I don't see any EBTs of the defendants in that case, and it settled.

Now, finally, if I look at Exhibit E attached to the Anthony Piazza affidavit, there is a certificate of

liability insurance from National Grange Insurance to Greenskeeper Landscaping, same amounts as our policies, 2 million aggregate, 1 million each occurrence, which provides liability coverage for Greenskeeper and adds Town Square as an additional insured. Again, the same type of requirement as was in the Masciarelli policies, Town Square had to be added as an additional insured.

And I mention that because I think that raises another question regarding the coverage. If you get to the question of, well, which of these two carriers is primary and which is excess, the automatic additional insured endorsement attached to plaintiffs' moving papers specifically provides that the Cincinnati insurance coverage is excess over any other insurance available to the additional insured, i.e., Town Square as an additional ensured by attachment of an endorsement to another insurance policy, whether that insurance policy is excess or any other basis. That's why I brought the Court's attention to the National Grange policy, because that would trigger this provision. If Town Square is an additional insured under that policy and if that policy applies, then we are excess.

THE COURT: But that's not before the Court. If that were before the Court, I could certainly decide that issue, as well as the issue that's been presented to the Court -- that is, the issue between the Town Square

insurance carrier and Masciarelli's carrier, which is squarely before the Court by virtue of these motions. But there's nothing before the Court regarding Greenskeeper or National Grange, so I certainly can't adjudicate that.

MR. CASEY: Well, I don't know that -- I mean, I think that at least there's a question of fact that if there is a policy, and this -- the affidavit and the documents we've submitted certainly suggest that there is, and you know, if there isn't, there isn't, but it appears there is a policy there that supplies additional coverage to them. And we have raised necessary party as an affirmative defense. Then this carrier and Greenskeeper are necessary parties to this action, which they didn't join. I mean, they know who their carriers are and who's covered.

THE COURT: Nobody moved the Court to compel joinder. I haven't seen any motion papers like that.

MR. POTASHNER: Your Honor, may I address this one issue? The New York case law is very clear. If there is another insurance out there, that's not a defense to this insurance carrier not to pay its obligation. It can then pay and go after the other carrier.

THE COURT: That's where I was coming to. I haven't gotten that far yet. If that's the way it works out, that's possibly a viable avenue. And even more so, it intrigues the Court because the Court is thoroughly familiar

with Town Square Mall parking lot. Although I hate to admit it, I do go down there on occasion; it does have Dick's Sporting Goods, as well as Sam's Club. I am familiar with the layout and where the out buildings are. It sounds to me like the Greenskeeper scope of coverage, the area where they're actually supposed to do the salting and plowing, is in relation to the out buildings, which are directly south of the main parking lot of the mall, which houses a large number of businesses in connected buildings. Then these other buildings, such as the restaurant, Visions Credit, the Barnes & Noble, they're all separate and distinct at the south end of the parking lot, and it sounds like that coverage might somehow be more applicable there. I'm not gonna get into that because it's not before me. But it's intriguing to me. So, if you gentlemen are -- maybe we can get back to Mr. Casey and what he was arguing, but I appreciate what you were talkin' about.

MR. CASEY: Well, I was just pointing out apparently there was another policy that would make us excess over their policy and I only just say before the Court, it's in the motion papers.

THE COURT: It's not in the pleadings. Nobody pled those people. I mean, it's not the Court's fault. Maybe not your fault.

MR. CASEY: Okay.

THE COURT: All right.

MR. CASEY: As far as the sole negligence issue, I would point out that a case cited by the plaintiffs, another Wausau case, which I think Mr. Potashner was involved in, in that case, I don't recall who the judge was, I think it's in the Southern District, but he specifically held that the sole negligence issue was a question of fact.

THE COURT: Yeah, but you have the burden of proof on the sole negligence issue, right?

MR. CASEY: Well, I think we raised a question of fact here.

THE COURT: Okay.

MR. POTASHNER: Your Honor, may I just respond to a few statements?

THE COURT: Briefly.

MR. POTASHNER: It will be very briefly. On the Greenskeeper, Mr. Casey was not the handling attorney, but if you look at the undisputed facts submitted by Cincinnati, as they admit in paragraphs 12, 13 and 14, Greenskeeper was responsible for the sidewalks, Masciarelli was responsible for the parking lot.

THE COURT: Okay.

MR. POTASHNER: That is the distinguishing issue.

THE COURT: Mr. Casey was careful when he read to me Greenskeeper's obligation. He was careful to talk about sidewalks and not parking lots. It's just interesting. Go ahead.

MR. POTASHNER: Okay. Second, if you look at the -- Masciarelli also testified, by the way, that he was responsible, actually deposed him at -- he was responsible for plowing all the parking lots and, in fact, salting all the parking lots. And I just point out the scope of work under the salting contract. "The contractor, at all times, will use his best efforts to cover all areas with salt so people do not get stuck or slip on ice." That's exactly what happened here. We don't know exactly how it happened. It's that uncertainty that creates a duty to defend. Cincinnati had the opportunity to come in, control the case, make a decision regarding settlement that it chose to make, and, instead, it just simply denied coverage and refused to step in and do its duty.

THE COURT: Okay. The Court is prepared to make a decision.

Plaintiffs commenced the instant action seeking a declaration that defendant had and has a duty to defend Town Square Mall in a personal injury action pending in state court; declaring that defendant had and has a duty to indemnify Town Square Mall in the underlying litigation;

declaring that the defendant's coverage is primary to that of plaintiff Wausau; and awarding damages for attorneys' fees and other amounts incurred in Town Square Mall's settlement of the underlying personal injury action. Presently before the Court are plaintiffs' motion for summary judgment and defendant's cross-motion for summary judgment.

Wausau issued an insurance policy for Town Square Mall. Cincinnati issued an insurance policy to Masciarelli Construction, which was retained under two contracts to provide salting and plowing services in the Town Square Mall parking lots. The Cincinnati policy included as an additional insured any person or organization for whom Masciarelli was required to add as an additional insured under a written contract or agreement, but only with respect to liability arising out of Masciarelli's ongoing operations performed for that additional insured.

It is clear in this case that Masciarelli had a written contract whereby it was required to add Town Square Mall as an additional insured. Thus, the Court finds, and Cincinnati appears to concede, that Town Square Mall is an additional insured, provided the liability arose out of Masciarelli's ongoing operations for Town Square Mall.

Cincinnati argues that Town Square Mall is

not an additional insured because no liability arose out of Masciarelli's ongoing operations performed for Town Square Mall. Cincinnati contends, because Masciarelli was not actually plowing or sanding or salting the parking lots at the time Mr. Williams slipped and fell, that there was no ongoing operations and, therefore, the additional insured provision is inapplicable here. Plaintiffs, on the other hand, contend that there were ongoing operations because the snow plowing and salting contracts were in full force and effect as of the date of Mr. Williams' accident and the contracts had not been fully completed because Masciarelli continued to be responsible for plowing and sanding the parking lots for that snow season.

Cincinnati's definition of "ongoing operations" is too narrow. Clearly, the concept of ongoing operations contemplates more situations than where the named insured is actually on site. Thus, for example, it is this Court's opinion that the additional insured provision clearly would be applicable where there was an ongoing construction project, but the injury occurred during non-work hours or during a pause in the construction. In this situation, there would be ongoing operations even though the named insured was not actually on site at the time of the incident. See Perez versus New York City Housing Authority, 302 A.D. 2d 222; Paolangeli versus

Cornell University, 187 Misc. 2d 559, 723 NYS 2d 835. In Perez, the Housing Authority retained a contractor for the testing and replacement of radiator valves and traps in the building where plaintiff was injured. The contractor replaced the radiator valves in the apartment in June 1996. The plaintiff was injured in November 1996. In December 1996, the contractor, pursuant to the contract, completed tests designed to assure that the new valves and traps were properly installed. The Appellate Division found that the, quote, ongoing operations, closed quote, provision was applicable. The Court stated that, quote, under any plain meaning of the word, the contractor's work was ongoing as long as the tests designed to assure proper performance remained undone, closed quote.

The plowing and sanding contracts, however, do not squarely fit within the construction example. Perez involved a specific task -- testing and replacement of radiator valves and traps in a building. Until that testing and replacement was completed, the operations were ongoing. Here, however, we are faced with a contract that contemplates discrete operations; that is, salting and sanding only when the need arises. Without doubt, there was an ongoing contract to plowing and sanding at the time of the injury to Mr. Williams. However, the existence of a contract to perform services does not compel the conclusion

that such plowing and/or sanding operations were ongoing at the time of the injury. In this sense, the Court believes that plaintiffs' definition is too broad. Take, for example, an attorney who was retained to be available to a client for a specific period of time to handle any legal issues that may arise during that period of time. Is the attorney actually engaged in ongoing representation of the client, or is the attorney simply contractually available when the need arises?

Nevertheless, considering the undisputed facts in the record, the Court finds that the underlying injury arose out of Masciarelli's ongoing operations for Town Square Mall. It is undisputed that Mr. Williams claims to have fallen on ice in the parking lot. Further undisputed that Masciarelli was obligated to clear the snow from and salt the parking lots. Under the terms of the salting agreement, Masciarelli was obligated, quote, at all times to use his best efforts to cover all areas with salt so people do not get stuck or slip on ice, closed quote. See Sanding Contract and the arguments here today. Because this was an ongoing obligation and it was alleged that there was ice on the parking lot on which Mr. Williams fell, the liability arose out of Masciarelli's ongoing operations.

In this regard, this case is similarly similar to the Minnesota case of K-Mart, Incorporated versus

Clean Sweep, Incorporated, 1997 Westlaw 666088, wherein the Court found the ongoing operations clause to apply where a person slipped and fell on snow in the parking lot hours after the contractor finished plowing and the property owner had inspected the parking lot. See also Dayton Beach Park No. 1 Corporation versus National Union Fire Insurance Company, 175 A.D. 2d 854. Similarly, Koala Miami Realty Holding Company, Incorporated versus Valiant Insurance Company, 913 So.2d 25, involved a situation where a company contracted to perform janitorial services to a property owner. An individual slipped and fell in the restroom and sued the janitorial company and the property owner. The Court found the property owner to be an additional insured because the liability arose out of the ongoing operations of the janitorial service. Compare KBL Cable Services of the Southwest, Incorporated versus Liberty, 2004 Westlaw 2660709.

The Court, therefore, finds that at the time the incident occurred, Masciarelli was involved in ongoing operations for Town Square and Town Square's liability for Mr. Williams' injuries arose out of Masciarelli's actions to or failures in connection with such ongoing operations. For these reasons the Court finds that Town Square Mall is an insured under the policy. We are, thus, presented with a question of whether Cincinnati owed Town Square a duty to

defend.

The duty to defend is exceedingly broad. IBM Corporation versus Liberty Mutual Fire Insurance Company, 303 Fed 3d 419, at 424. See also Servidone Construction Corporation versus Security Insurance Company, 64 NY 2d 419, at 423 and 424. Determining whether there is a duty to defend requires examination of the policy language and the allegations in the underlying complaint to see if it alleges any facts or grounds that bring the underlying action within the policy. IBM Corporation at 424. An insurer must defend whenever the four corners of the complaint suggest or the insurer has actual knowledge of facts establishing a reasonable possibility of coverage. IBM Corporation 424.

The complaint in the underlying litigation alleges that at the time of Mr. Williams' fall, Masciarelli was responsible for maintaining the parking lot at the Town Square Mall, that Mr. Williams, quote, slipped and fell due to black ice in the parking lot, closed quote, and that the, quote, parking lot was in a dangerous condition, closed quote, that Masciarelli and Town Square Mall had a duty to keep the parking lot in a reasonably safe condition, that Masciarelli and Town Square failed to maintain the parking lot in a reasonably safe condition, that black ice in the parking lot was an unsafe condition and that, as a result of

the fall, Mr. Williams sustained injury for which Masciarelli and Town Square Mall are responsible. These facts give rise to a reasonable possibility of coverage and, therefore, a duty to defend. These facts suggest that an insured, Town Square Mall, is liable arising out of Masciarelli's ongoing operations performed for Town Square Mall. Cincinnati, therefore, owed Town Square Mall a duty to defend.

The next question is whether Cincinnati is required to indemnify for the settlement in the underlying litigation. An insurer's breach of a duty to defend does not create coverage and, even in cases of negotiated settlements, there can be no duty to indemnify unless there is first a covered loss. Servidone, 64 NY 2d at 423. Thus, a determination must be made whether there is a covered loss.

Based on the undisputed record, the Court concludes that there is. The undisputed record evidence is that Williams fell on black ice in the parking lot owned by Town Square Mall which was supposed to be plowed and sanded or salted by Masciarelli. This falls squarely within the Cincinnati policy.

Relying on certain policy language, Cincinnati argues that plaintiffs have failed to prove that the incident was not the result of Town Square Mall's sole

negligence. The policy reads at follows: Quote, the insurance provided to the additional insured does not apply to bodily injury arising out of the, B, sole negligence or willful misconduct of the additional insured or its employees, closed quote. Assuming the burden is on plaintiffs, there is insufficient evidence in the record upon which a fair-minded trier of fact could reasonably conclude that the incident arose out of Town Square Mall's sole negligence. The undisputed record evidence is that, by contract, Masciarelli was obligated to Town Square Mall to sand, salt and plow the parking lot. There is no allegation or evidence tending to suggest that Town Square Mall's decision to retain Masciarelli was the sole contributing factor resulting in Williams' injury.

In any event, plaintiffs do not have the burden to prove that the incident was not the result of Town Square Mall's sole negligence. The policy language relied on by Cincinnati is that of a policy exclusion. See, for example, Gap, Incorporated versus Fireman's Fund Insurance Company, 11 A.D.3d 108, at 110; Hotel des Artistes, Incorporated versus General Accident Insurance Company of America, 9 A.D.3d 181, at 184. Under each set of circumstances, the burden is on the insurer to establish the applicability of the policy exclusion. Throgs Neck Bagels, Incorporated versus General Accident Insurance

Company of New York, 241 A.D.2d 66, at page 70. Cincinnati has not pointed to any evidence tending to suggest that Mr. Williams' injuries were the result of Town Square Mall's sole negligence. Accordingly, the Court finds that there was a covered loss.

The next issue, whether Cincinnati has a duty to indemnify the Town Square Mall for the covered loss, depends on which policy is primary. The relevant portions of the Wausau insured agreement states, A, primary coverage. This insurance is primary except where, B, below applies. B, excess insurance. This insurance is not excess over, sub 2, any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement. See Exhibit 7 to the affidavits, relevant portions of Wausau Insurance policy, form CG00010798, page 13.

The relevant portion of Cincinnati's insured agreement states the insurance provided to the additional insured does not apply to, quote, bodily injury, property damage, personal injury or advertising injury arising out of the, sub B, sole negligence or willful misconduct of or for defects in design furnished by the additional insured or its employees. Any insurance provided hereunder shall be excess over any other insurance available to the additional insured

as an additional insured by attachment of an endorsement to another insurance policy, whether that other insurance policy is primary, excess, contingent or on any other basis. See Henn affidavit, Exhibit A, form GA4720199. The plain meaning of the just quoted section of the Cincinnati policy is that it is excess coverage only with respect to someone who has been added as an additional insured by endorsement to another insurance policy. Although Town Square Mall was covered by the Wausau policy, it is not an additional insured under that policy. Therefore, the Cincinnati policy is primary and Cincinnati has a duty to indemnify Town Square Mall in the underlying litigation.

The final issue pertains to Cincinnati's claim that the $99,000 settlement in the underlying personal injury action is unreasonable. Cincinnati argues it is entitled to challenge the reasonableness of the amount paid in settlement. Wausau responds that because Cincinnati has not put forth any evidence that the settlement is unreasonable, there is no genuine issue of fact as to its reasonableness.

Plaintiffs have provided evidence in support of the settlement amount, including evidence concerning the injuries in the underlying personal injury action, which was a herniation of the cervical disk at C-6/C-7, resulting in permanent partial disability, and evidence that liability in

that case was fairly certain. In response, defendant has not submitted any evidence tending to suggest that the settlement was unreasonable or otherwise creating a triable issue of fact -- I think that should be plaintiff. In response, plaintiff has not submitted any evidence tending to suggest that the settlement was unreasonable --

MR. POTASHNER: Your Honor, that might be -- I think it's defendant.

THE COURT: You're right. Excuse me. I think I have been doin' this too long.

On a motion for summary judgment, parties may not rest on mere allegations but must provide the Court with probative evidence tending to support their claim. Anderson versus Liberty Lobby, Inc., 447 U.S. 242. Cincinnati has the duty to provide the Court with evidence which it believes demonstrates the unreasonableness of the settlement agreed to by plaintiffs. Without providing the Court with evidence to support its claim and merely alleging unreasonableness, Cincinnati has failed to carry its burden and has put forth no genuine issue of material fact concerning the issue of settlement.

For the foregoing reasons, plaintiffs' motion for summary judgment is granted and defendant's cross-motion for summary judgment is denied. The Court finds that defendant had and has a duty to defend Town Square Mall in

the personal injury action pending in state court, defendant has a duty to indemnify Town Square Mall in the underlying litigation, that the defendant's coverage is primary to that of plaintiff Wausau, and plaintiffs are entitled to an award of attorneys' fees, costs and settlement amount incurred in Town Square Mall's settlement of the underlying personal injury action.

Plaintiffs are to submit an order on notice to defendant within 11 days of today's date.

Court stands adjourned in this matter. Thank you, gentlemen.

MR. CASEY: Thank you, Judge.

MR. POTASHNER: Thank you, your Honor.

(This matter adjourned at 11:55 AM.)

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CERTIFICATION:

I, THERESA J. CASAL, RPR, CRR, Official Court Reporter in and for the United States District Court, Northern District of New York, do hereby certify that I attended at the time and place set forth in the heading hereof; that I did make a stenographic record of the proceedings held in this matter and cause the same to be transcribed; that the foregoing is a true and correct transcript of the same and the whole thereof.

_____

THERESA J. CASAL, RPR, CRR

Official Court Reporter

DATE: